

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

|                               |   |                       |
|-------------------------------|---|-----------------------|
| MARK A. STAPLES,              | ) |                       |
| Defendant below, appellant,   | ) |                       |
|                               | ) |                       |
| v.                            | ) | C.A. No.: 2004-06-672 |
|                               | ) |                       |
| CANDICE and ROBERT DALRYMPLE, | ) |                       |
| Plaintiffs below, appellees.  | ) |                       |

Submitted: December 22, 2005  
Decided: February 7, 2006

Herbert G. Feuerhake, Esquire  
Attorney-At-Law  
521 West Street  
Wilmington, Delaware 19801  
Attorney for Plaintiffs-Below, Appellant

Donald L. Gouge, Jr., Esquire  
Attorney-At-Law  
Heiman, Gouge & Kaufman  
Wilmington, Delaware 19801  
Attorney for Defendant-Below, Appellees

**DECISION AFTER TRIAL**

In this action, defendant-below appellant Mark A. Staples (hereinafter "Staples") purchased a home at 18 Harvest Lane in Newark, Delaware from plaintiffs-below appellees Candice and Robert Dalrymple (hereinafter "Dalrymple") on August 27, 2002. At settlement, the parties entered into an escrow agreement (hereinafter "escrow") where \$3,900.00 from the seller proceeds would be held by the settlement attorney for any needed repairs for a wood burning stove. J. Calvin Williams, Jr., Esq. served as the escrow agent. Dalrymple seeks return of the \$3,900.00, attorney's fees, costs, and pre and post judgment interest. Dalrymple argues that the terms of the escrow agreement required all matters to be concluded within 30 days of August 27, 2002 which has since

passed. Staples seek the \$3,900.00 in escrow on the basis that the item covered has not been properly installed and approved by the inspection authorities. Trial was held on December 22, 2005. This is the Court's final decision and order.

### FACTS

The parties entered into an agreement where Dalrymple would sell and Staples would purchase the property at 18 Harvest Lane, Newark, Delaware.<sup>1</sup> Settlement was scheduled for August 27, 2002 to be held by J. Calvin L. Williams, Esquire. Prior to settlement there was a home inspection that required the Dalrymples to perform certain maintenance and repairs before transfer. This also required an inspection of the wood burning stoves Dalrymple had previously self-installed on the first level and the second level of the property.

The first inspection of the stove and chimney required certain repairs that were made by Dalrymple. These repairs were set forth in an endorsement to the sales agreement dated July 30, 2002<sup>2</sup>. This endorsement required the following:

- “1) The chimney cleaned and inspected (paid by buyer); If repairs are needed above \$500.00 to be paid by seller
- 2) The wall to be treated for Caliform Bacteria and rechecked after treatment
- 3) Make repairs to lines and flue, per report of 7/25 of both stoves – seller will do.”

The Dalrymples hired Chimney Guard to perform the chimney work at the cost of \$325.00. This was not satisfactory to the purchaser so a second contractor was retained to do a follow-up evaluation. Three days prior to settlement, Staples presented a report

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<sup>1</sup> Plaintiff's Exhibit No.: 1

<sup>2</sup> Plaintiff's Exhibit No. 6

by Swift Services who did an inspection and gave him an estimate for the work at \$5,000.00. This report outlined four items that needed repairs to the chimney and the stove. This was not satisfactory to the sellers so they got a third opinion from Great Fireplaces of Wilmington. Dalrymple hired Mack & Sons to make the repairs. Mack & Sons moved the upstairs stove downstairs and replaced the upstairs stove with a unit which did not require high clearances. Mack concluded that replacing the upstairs stove with a Lucky model with a firebox and low clearance would solve the problem. He also repaired the cracks in the chimney. The cost was approximately \$2,700.00 and he provided certification. Staples disputed the validity of the certification from Mack & Sons, therefore, the parties escrowed \$3,900.00 at settlement from seller's funds for any necessary follow-up repairs.

The escrow agreement executed by the parties provided:

- 1) That a problem has been identified with a wood burning stove;
  - a.) That sellers and buyers shall share the cost of another independent inspection.
  - b.) Sellers shall pay for repairs determined necessary to repair the above according to the fourth inspection, which shall meet full approval of State Farm.
  - c.) ...
  - d.) Repairs shall include proper materials and proper clearance.
  - e.) Adequate documentation, properly certified, shall be submitted to Joyce Hoover of State Farm who must approve within fourteen (14) days. But if State Farm approves the certification previously done by

William M. Mack & Sons and will insure the property with no added premium then escrows shall be released.

f.) Escrow to close not later than thirty (30) days from today.<sup>3</sup>

Dalrymple testified Mack & Sons certification was sent to State Farm on August 26, 2002. They also testified the property was insured by State Farm for the entire time they owned the property. However, on cross-examination Mr. Dalrymple conceded he did not receive a policy from State Farm that specifically approved the stove.

The Dalrymples also admitted he received a document dated September 19, 2002 from Marinelli Masonry, Inc. regarding the condition of the chimney. This report indicated the cap was cracked and the first flue had a hairline crack. They were also of the opinion that the stove on the first floor was unsafe and should not be used until the face and the hearth were repaired. The estimated cost of repair totaled \$1,900.00.<sup>4</sup>

The New Castle County Code inspector testified that he inspected the property sometime around November 18, 2003 after receiving a complaint regarding a wood burning stove. The County records indicate there was an open permit for the stove but no final inspection. Therefore, he did not know what to do about the stove.

Michael Salenni testified for Staples and indicated he worked for Swift Services. The nature of their business was chimney restoration and wood stove inspection. They inspected the property August 2002. Based on his inspection he concluded that the top of the chimney was broken, the floor where the stove sat was not fire resistant, inside the chimney was cracked, the stove was ok, but the wall was warped and needed a liner. Salenni also concluded the work of Mack & Sons was not sufficient to certify the stove

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<sup>3</sup> Plaintiff's Exhibit No.: 4

<sup>4</sup> Defendant's Exhibit No.: 1

under the Code. On cross-examination, he indicated the cost for the chimney repair would be \$1,342.00.

Staples testified he was informed by State Farm not to use the wood stove until it was properly inspected. However, he was issued subsequent policies by State Farm which did not exclude the wood stove. He also testified that the parties could not agree on a contractor or an amount for the repairs.

#### **ANALYSIS**

At trial, it became evident that both parties have been unable to agree on the cost for subsequent proposed repairs. Defendant's Exhibit No. 1 is a fax from Marinelli Masonry, Inc. dated September 21, 2002 with an attachment titled, "PROPOSAL-ACCEPTANCE." The document lists a number of outstanding repairs and gave an estimated cost of \$1,900.00. A second estimate from Swift Services was obtained and indicated a cost of \$1,342.00. Despite these two estimates, the parties failed to agree on a vendor and amount to be paid. This disagreement caused the escrow agent's fee to increase.

The escrow agent, Williams, testified at trial that Dalrymple instructed him to release \$175.00 from the account for an inspection performed by Bottom Line Mechanical Services. The net amount in escrow presently, according to Williams, is \$3,725.00. Williams further testified that the terms of the escrow provided that his fees will be paid from the escrow. Plaintiff's Exhibit # 5 is an invoice from Williams which lists the time spent on the instant matter, and as of December 21, 2005, at \$300.00 per hour. His fee presently totals \$1,230.00, which does not include "travel time and time to

appear on December 22, 2003.” At trial, Williams estimated this additional time increased his fee to \$1,580.00.

Dalrymple argues that since the terms of the escrow have not been satisfied, specifically since no repairs were identified within 30 days of August 27, 2002 and since the property was already insured by State Farm, they are entitled to the balance held in escrow by Williams, court costs, attorney’s fees and pre and post judgment interest. Staples argues that since the terms of the escrow have not been satisfied, the money should remain in the escrow until it can be applied to the repairs. Their counterclaim seeks \$3,900.00 “for proper and safe installation of the stove per stove manual, the cost to obtain the required permits from New Castle County; court costs; attorney fees; and pre and post judgment interest.”

According to the terms of the escrow, both parties were obligated to perform their contractual duties within 30 days of its execution. Clearly, 30 days have long since past and the parties cannot come to an agreement as to the repairs, certification, and approval from State Farm. The parties were provided with two proposals to correct the necessary repairs. Both of which were within the amounts that could have been paid from the escrow. Due to the unreasonable delay of both parties in coming to an agreement, the attorney fee has increased to such a level that the main purpose of the escrow has been substantially impaired. It is this Court’s conclusion that both parties have failed to comply with the terms of the escrow agreement, and both parties share responsibility for the delay.

It is clear from the record that the chimney is in need of repair. There are two estimates, one from Marinelli Masonry at \$1,900.00, and a second from Swift Services at

\$1,342.00. I award the sum of \$1,042.00 to Staples for repair of the chimney. I award the Dalrymples the sum of \$2,083.00, the balance in the escrow. The amount awarded to each party has been adjusted by their pro rata share of the cost for attorney's fees payable from the escrow account. I award J. Calvin Williams, Esquire the sum of \$600.00 for attorney fees. Each party will bear their individual cost of these proceedings and attorney fees. Additionally, I find no basis to award pre- or post judgment interest.

SO ORDERED this 7<sup>th</sup> day of February, 2006

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Alex J. Smalls  
Chief Judge

Staples-OP Jan 06